Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

No. 67, Original

State of Idaho, ex rel. JOHN V. EVANS, Governor;
DAVID H. LEROY, Attorney General;
JOSEPH C. GREENLEY, Director, Department of Fish and Game,
Plaintiff,

v.

STATE OF OREGON, STATE OF WASHINGTON,
Defendants

PLAINTIFF'S REPLY TO MEMORANDUM OF UNITED STATES AS AMICUS CURIAE

DAVID H. LEROY
ATTORNEY GENERAL
STATE OF IDAHO

W. HUGH O'RIORDAN
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES DIVISION

JOHN C. VEHLOW
DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF FISH AND GAME

Statehouse
Boise, Idaho 83720

FRED J. FRAHM
OF COUNSEL
Counsel for Plaintiff

INDEX

Introduction 2

I. The Master's determinations are supportive of Idaho's claim to 2

II. Amicus Curiae has grossly overstated the complexity of the issues presented in this case 3

III. Contrary to the assertions of the Amicus Curiae, no need for continuing jurisdiction has been shown 4

IV. Resolution of the conflict through mutual accommodation will be encouraged by judicial recognition of Idaho's equitable rights 5

Conclusion 6

TABLE OF AUTHORITIES

Cases

Arizona v. California, 373 U.S. 546 (1963) 5
California v. Arizona, 59 L. Ed. 2d 144 (1979) 4
Nebraska v. Wyoming, 325 U.S. 509 (1945) 5
New Jersey v. New York, 283 U.S. 336 (1931) 5
Wisconsin v. Illinois, 281 U.S. 696 (1930) 5
Wyoming v. Colorado, 259 U.S. 419 (1922) 5

In the Supreme Court

OF THE

United States

No. 67, Original

State of Idaho, ex rel. JOHN V. EVANS, Governor;
DAVID H. LEROY, Attorney General;
JOSEPH C. GREENLEY, Director, Department of Fish and Game,
Plaintiff,

v.

STATE OF OREGON, STATE OF WASHINGTON,
Defendants

PLAINTIFF'S REPLY TO MEMORANDUM OF UNITED STATES AS AMICUS CURIAE

DAVID H. LEROY
ATTORNEY GENERAL
STATE OF IDAHO

W. HUGH O'RIORDAN
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES DIVISION

JOHN C. VEHLOW
DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF FISH AND GAME

Statehouse
Boise, Idaho 83720

FRED J. FRAHM
OF COUNSEL
Counsel for Plaintiff

INTRODUCTION

In the present proceeding the Special Master has recommended the dismissal of Idaho's complaint for failure to join the United States as an indispensable party. The Master suggests such dismissal be without prejudice to Idaho's right to refile if unable to obtain relief through mutual accord. Master's Report, 31. At the Court's invitation, the United States filed a memorandum as amicus curiae endorsing the Master's findings of fact and principal conclusions. United States' Memorandum, 1-2. The defendant states of Oregon and Washington failed to submit exceptions to the Master's Report.

Idaho submits the following reply to the Memorandum of the United States. This reply focuses upon the assertions of the United States that the issues presented are unduly complex and will burden the Court. Plaintiff's exceptions previously filed with this Court regarding the alleged indispensability and sovereign immunity of the United States sufficiently rebut the assertions of the Department of Justice.[1]

I.

THE MASTER'S DETERMINATIONS ARE SUPPORTIVE OF IDAHO'S CLAIM TO EQUITABLE APPORTIONMENT

Contrary to the assertions of the Department of Justice (Memorandum, 2), the findings of the Special Master are

[1]Contrary to the assertion of the Department of Justice that ". . . this Court need not assess the 'wisdom' of the government's decision not to intervene," (U.S. Memorandum, 5, fn. 2), Idaho asserts that this Court must analyze the basis for the government's position when the concept of sovereign immunity is relied upon. In fact, an analysis of the widsom of the government's decision reveals that there is no basis to support the alleged sovereign immunity.

supportive of Idaho's position. In fact, the Master's Report is favorable to Idaho's position on many significant points. Most importantly, the Master specifically found that Idaho subsidizes the downstream fisheries and, as a result, receives but few of the many fish it produces. Master's Report, 10, 11.

This basic inequity to Idaho stands in contrast to the position of the Department of Justice that the courthouse doors should be shut to Idaho. While the United States attempts to soften the denial of judicial relief to Idaho by asserting that the dismissal is without prejudice, the fact remains that relief is being denied to a meritorious claim.

II.

AMICUS CURIAE HAS GROSSLY OVERSTATED THE COMPLEXITY OF THE ISSUES PRESENTED IN THIS CASE

The Memorandum of the Department of Justice seeks to magnify the complexity of the issues presented for review in an apparent attempt to frighten the Court into refusing this litigation. However, a look at the legal issues presented establishes the simplicity of Idaho's claim. Idaho seeks only judicial recognition of its right to an equitable apportionment of anadromous fish.

Any complexities that may arise in this case are secondary to recognition of the equitable rights of Idaho. The complexities cited by amicus curiae simply do not go beyond this Court's performance of its article III judicial functions.

The government bases its position on the assertion that federal operation of the dams and management of the ocean

fishery involve complex policy decisions not "readily susceptible to judicial review." Id, 3. The United States overlooks the fact that policy in both areas is controlled by federal statutes which strongly favor the position of the State of Idaho. Further, the United States exercises no control over regulatory allocations in the Columbia River.[2] Accordingly, the United States plays no role in the issue presently before the Court and should not be considered a necessary party.

Finally, "such [consideration of factual complexity is] hardly relevant to the exercise of this Court's original and exclusive jurisdiction." *California* v. *Arizona*, 59 L. Ed. 2d 144, 152 (1979) at n. 8. Because this Court is the highest Court in the nation, it has the unenviable responsibility of resolving complex disputes. A dismissal in this case only delays the ultimate resolution, it does not remove the legal issues.

III.

CONTRARY TO THE ASSERTIONS OF THE AMICUS CURIAE, NO NEED FOR CONTINUING JURISDICTION HAS BEEN SHOWN

The Special Master found that any decreed apportionment in this case will require daily supervision and concluded that such decree will require the exercise of continuing jurisdiction. Master's Report, 20-21. Idaho objects to that conclusion, and its endorsement by the government, because such determination is premature and should await

[2]Record, 221; Exhibit W-4 at Q-1.

full presentation of evidence on the merits. Only after a full hearing can this Court determine whether daily supervision is necessary.

Obviously, management of the anadromous fishery resource of the Columbia Basin is a complex science not subject to ultimate precision. Idaho does not dispute that the equities of production will vary to some degree following trial. Yet, this Court has stated that difficulties of drafting and enforcing a decree do not obviate its vested constitutional function.[3]

Idaho submits that, where appropriate, the Court has retained jurisdiction, allowing the parties to later apply for modification or enforcement of a decree.[4] Consequently, Idaho submits that retained jurisdiction is a feasible alternative which should not be negated until full hearing on the merits.

IV.

RESOLUTION OF THE CONFLICT THROUGH MUTUAL ACCOMMODATION WILL BE ENCOURAGED BY JUDICIAL RECOGNITION OF IDAHO'S EQUITABLE RIGHTS

The Special Master ultimately concluded that the desirable resolution of the pending conflict rests in mutual accommodation and expert administration, rather than liti-

[3]*Nebraska* v. *Wyoming*, 325 U.S. 509, 616 (1945).

[4]The Supreme Court retained jurisdiction over: *Wisconsin* v. *Illinois*, 281 U.S. 696 (1930); *New Jersey* v. *New York*, 283 U.S. 336 (1931); *Wyoming* v. *Colorado, 259 U.S. 419 (1922)*; *Nebraska* v. *Wyoming*, 325 U.S. 509 (1945); *Arizona* v. *California*, 373 U.S. 546 (1963).

gation. Master's Report, 24. The government has heartily endorsed that finding. Memorandum, 3, 4.

This position is contrary to the findings of the Master that this controversy has been going on for years, that Idaho has been rebuffed in efforts to join the Columbia River Fish Compact, and that Idaho as a non-party may not compel adherence to the *Sohappy* settlement agreement. Master's Report, 5, 6, 13.

It is the lack of mutual accommodation which brought Idaho before this Court as its only available forum. Dismissal without prejudice will do nothing to supply the needed accord suggested by the Master. Such dismissal will not ". . . supply a goad to that end . . ." as the government envisions. Memorandum, 4. Continued cooperation by the United States in aiding the parties toward settlement is offered (Id., 4), but will fail to produce compromise given the attitudes of the defendants. In fact, it will be extremely difficult for Idaho, while laboring under dismissal without prejudice, to obtain even the minimal relief which the government failed to obtain from the defendants and the tribes under threat of intervention.[5] Only through strong judicial initiative can this action be resolved quickly and without undue complexity.

CONCLUSION

Because Oregon and Washington did not lodge briefs with the Court regarding their respective position, Idaho has limited its reply to only a rebuttal of the federal contentions asserted in the United States' Memorandum. Relying

---

[5]See Plaintiff's Exceptions, Appendix C.

upon the exceptions filed on May 2, 1979, and the above reply to the United States, Idaho urges this Court to determine that the United States is unnecessary to adjudication of the pending litigation. Accordingly, this Court should overrule the Master's conclusion of indispensability and recommendation of dismissal without prejudice, thereby allowing Idaho to adjudicate this crucial issue at the present time.

DATED this 31st day of May, 1979.

DAVID H. LEROY
ATTORNEY GENERAL
STATE OF IDAHO

W. HUGH O'RIORDAN
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES
DIVISION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 1979, three copies of PLAINTIFF'S REPLY TO MEMORANDUM OF UNITED STATES AS AMICUS CURIAE were mailed, postage prepaid, to:

DIXY LEE RAY
GOVERNOR
OFFICE OF THE GOVERNOR
Olympia, Washington 98504

SLADE GORTON
ATTORNEY GENERAL
TEMPLE OF JUSTICE
Olympia, Washington 98504

EDWARD B. MACKIE
DEPUTY ATTORNEY GENERAL
TEMPLE OF JUSTICE
Olympia, Washington 98504

VICTOR ATIYEH
GOVERNOR
OFFICE OF THE GOVERNOR
Salem, Oregon 97310

JAMES A. REDDEN
ATTORNEY GENERAL
STATE OFFICE BUILDING
Salem, Oregon 97310

BEVERLY B. HALL
ASSISTANT ATTORNEY GENERAL
State Office Building
Salem, Oregon 97310

RAYMOND P. UNDERWOOD
ASSISTANT ATTORNEY GENERAL
State Office Building
Salem, Oregon 97310

HONORABLE WADE MCCREE
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D.C. 20530

WENDELL WYATT
Souther, Spaulding, Kinsey, Williamson & Schwabe
1200 Standard Plaza
Portland, Oregon 97204

ROBERT E. SMYLIE
300 Simplot Building
Boise, Idaho 83702

and further that all parties required to be served were served.

DAVID H. LEROY
ATTORNEY GENERAL
State of Idaho